Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 40 | Issue 3 Article 5

Spring 1965

Preservation of Indiana's Scenic Areas: A Method

PRESERVATION OF INDIANA'S SCENIC AREAS: A METHOD

The urbanization of Indiana proceeds at a rapid pace,[1] and as its cities grow, the preservation of the state's scenic areas becomes an increasingly acute problem.[2] Historically, states and their subdivisions, working separately or in conjunction, have endeavored to preserve scenic areas by employing the zoning power or by condemning the fee under the power of eminent domain. However, in most jurisdictions zoning ordinances predicated solely upon aesthetic considerations have been invalidated.[3] This has been the case in Indiana,[4] and consequently, the zoning power cannot be employed effectively to preserve scenic areas.

Theoretically a state could use its power of eminent domain to preserve scenic areas. On a practical level, however, there are numerous reasons which prohibit this type of solution. The most basic reason, of course, would be the prohibitively high cost of acquiring the fee or any lesser interest. In connection with this, local authorities who wish to condemn land to preserve scenic areas and who lack financial resources are seldom able to secure economic assistance from state officials.[5] Thus, in most instances, they abandon their plans since they are reluctant to create a bonded debt.

In addition to the cost factor, there are other reasons why the eminent domain power is not suited to the task of preserving scenic areas. For

1. According to the 1940 census, 55.1% of Indiana's population lived in urban areas. By 1960 this percentage had increased to 62.4%. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (83d ed. 1962). There is no reason to believe this trend will reverse itself.

2. Preservation of scenic areas has become a widespread problem. See generally CLAWSON, HELD & STODDARD, LAND FOR THE FUTURE (1960); SEIGEL, THE LAW OF OPEN SPACE (1960).

3. For general discussions of aesthetic zoning, see Anderson, *Regulation of Land Use For Aesthetic Purposes*, 15 SYRACUSE L. REV. 33 (1963); Dunkeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. CALIF. L. REV. 149 (1953); Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A.J. 471 (1949); Note, 29 FORDHAM L. REV. 729 (1961), and cases cited therein.

4. General Outdoor Advertising Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). In this case, the Indiana Supreme Court, in holding that an ordinance prohibiting billboards within 500 feet of a park or boulevard was valid but unenforceable as to existing billboards except on payment of compensation, stated, ". . . citizens must not be compelled under the police power to give up rights in property solely for the attainment of aesthetic objectives."

5. *E.g.*, in 1960 less than 2% of all funds spent by local governmental units for parks and other scenic areas came from the states. THE COUNCIL OF STATE GOVERNMENTS, STATE RESPONSIBILITY IN URBAN REGIONAL DEVELOPMENT 155 (1962).

example, intelligent planning to preserve such areas might well require the state to condemn large tracts many years before they are actually threatened by urbanization. Such a requirement would present a formidable problem in those jurisdictions which have held that the state may not exercise its eminent domain power to condemn land in advance of its immediate needs.[6] Other jurisdictions, however, have upheld advance acquisition of land when, for example, it was to be used for a future airport or a public street.[7] Even in these jurisdictions, however, it could be argued that the courts would not extend their present positions on advance acquisition to permit acquisition of scenic areas on the mere contingency that someday they might be engulfed by the growth of nearby urban complexes.

Another factor tending to make eminent domain an unsuitable device for preserving scenic areas is that elected officials might oppose large scale acquisition of such areas on the assumption that a politically rational allocation of state funds would dictate giving greater aid to schools and other public projects instead of providing beautiful views for those who travel along state highways. Finally, many "conservatives" would surely oppose large scale governmental ownership of land for any purpose.

Because of the inadequacy of the traditional methods of preserving scenic areas, new and, in most instances, untested methods have come into existence. These methods include tax relief plans, state acquisition of development rights, compensable regulation under state law, and private programs designed to encourage landowners to limit voluntarily their property to residential uses.[8] This note deals with one type of private approach, but before examining it in depth the other methods previously mentioned will be discussed briefly and their shortcomings noted.

I. Preservation Based on Public Power

A. *Tax Relief Plans*

High property taxes often force development of those scenic areas which are adaptable to subdivision. In order to provide landowners with incentives not to sell their land to developers it has been advocated that

6. Grand Rapids Bd. of Educ. v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954); State *ex. rel.* City of Duluth v. Duluth St. Ry., 179 Minn. 548, 229 N.W. 883 (1930).

7. Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953), *cert. denied*, 346 U.S. 821 (1954) (airport); City of New Orleans v. Moeglich, 169 La. 1111, 126 So. 675 (1930) (public street). See Note, *Techniques for Preserving Open Space*, 75 Harv. L. Rev. 1622, 1635 (1962).

8. Methods of preserving scenic areas by the use of greenbelt zoning, cluster zoning, contract zoning, conditions subsequent, and rights of reverter are not discussed in this note.

preferential tax treatment be extended to such landowners.[9]

Any statute providing for assessment of property taxes based on the restricted use to which the land would be put would generate serious constitutional problems. Attempts to classify real property taxes by relationship to land use have been declared invalid in many jurisdictions.[10] In view of the Indiana Supreme Court's strict, literal interpretation of the uniform tax clause in the state constitution it seems likely that a reduction of property taxes commensurate with the limited use to which land might be put (under a land preservation program) would be declared unconstitutional.[11]

In addition to the constitutional objection to property tax concessions as a method of preserving scenic areas, it has been suggested that the process of granting exemptions feeds upon itself.[12] This conclusion is based on the thought that as more and more exemptions are granted, the tax burden becomes greater upon the persons left to bear it with the result that, in many instances, undeniable demands for even more exemptions are pressed upon the legislature. In view of the working of our political processes this self-propagation of exemptions appears to be a valid criticism.

Even if a tax relief plan did not destroy itself or succumb to constitutional attack, it would seem that in scenic areas where expansion

---

9. RAWSON, PROPERTY TAXATION AND URBAN EFFECTS OF THE PROPERTY TAX ON CITY GROWTH AND CHANGE (Urban Land Institute Research Monograph No. 4, 1961); Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628.

10. Swiftz v. Kingsley, 37 N.J. 556, 182 A.2d 841 (1962). *Cf.* Bettigale v. Assessors of Springfield, 342 Mass. 223, 178 N.E.2d 10 (1961); State *ex. rel.* Park Investment Co. v. Board of Tax Appeals, 175 Ohio St. 410, 195 N.E.2d 908, 910 (Ohio 1964) ("[T]here is no constitutional authorization for classification of real property for taxation in relation to its nature or use. All property . . . must be assessed on the basis of the same uniform percentage of actual value").

11. Ind. Const. art. X § 1:

> The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, education, literary, scientific, religious, or charitable purposes, as may be specially exempted by law.

It has been interpreted strictly and literally. Finney v. Johnson, 342 Ind. 465, 179 N.E.2d 718 (1962); Wright v. Steers, 242 Ind. 583, 179 N.E.2d 721 (1962). Indiana presently has several property tax statutes favoring agricultural and forested land which seem vulnerable to constitutional attack. *E.g.*, IND. ANN. STAT. § 65-128 (Burn's 1961) (annexation statute granting tax favoritism to rural areas); IND. ANN. STAT. § 32-3019 (Burn's 1949) (land to be taxed at one dollar per acre for general taxation purposes if owner plants upon it trees of certain size and number); Ind. Acts 1963, ch. 323 (land to be taxed as agricultural land despite non-agricultural potential as long as agricultural use lasts). For an excellent discussion of uniform property taxation in Indiana, see Note, *Uniform Property Taxation in Indiana: The Need For a Constitutional Amendment*, 38 IND. L.J. 72 (1962).

12. Walker, *Loopholes In State And Local Taxes*, 30 TAX POLICY 4 (1963).

of neighboring cities was imminent landowners would fall prey to the temptation to realize greater prospective income by adapting their land to other than residential uses even though an advantageous tax position would be sacrificed. Because of these reasons, preferential tax treatment by itself promises little success as a method for comprehensive preservation of scenic areas.

B. *Development Rights*[13]

Several legislatures have enacted statutes authorizing the state to acquire development rights in land.[14] After development rights (which are statutory interests in real property) are surrendered the owner may continue to use and enjoy the land, but it is subject to the right of the state to keep it undeveloped. This restriction runs with the land and binds all subsequent purchasers. No decision has yet recognized the validity of bare development rights as enforceable interests in land although there is no apparent reason why their validity should be denied.

Like the other novel methods of preserving scenic areas, the use of development rights can be criticized in several respects. One authority[15] on land use control has attacked the enabling acts which provide for state acquisition of development rights by pointing out that these acts do not clearly spell out, as they should, what interests the landowner forfeits under a development right scheme. This seems to be a just criticism since courts would surely declare themselves incapable of enforcing use restrictions of an indefinite nature.[16]

Even if the extent of the interest surrendered by the landowner is amply defined, other objections remain to the use of development rights. Where development is imminent, for example, it seems clear that a governmental body acquiring development rights might have to pay almost the full value of the land. In addition, it has been observed[17] that courts would be reluctant to issue injunctions prior to a breach of the restrictions and that damages are not only difficult to ascertain but are insufficient

13. Development rights have also been referred to as conservation easements, scenic easements, and development easements.

14. CAL. GOV'T CODE §§ 6950-54, 7000; MD. CODE ANN. art. 66(c), § 357(a) (Supp. 1964); MASS. GEN. LAWS ch. 40, § 8(c) (1961); N.J. STAT. ANN. § 13:8A-1 (1961); N.Y. CONSERVATION LAW §§ 1-0701, 1-0708. See generally WILLIAMS, LAND ACQUISITION FOR OUTDOOR RECREATION—ANALYSIS OF SELECTED PROBLEMS (O.R.R.R.C. Study Report 16) (1962), for a cursory study of the legal problems generated by these statutes.

15. WILLIAMS, *op. cit. supra* note 14, at 48.

16. Pontiac Improvement Co. v. Board of Comm'rs of Cleveland Metropolitan Park Dist., 104 Ohio St. 447, 135 N.E. 635 (1922). See Kransnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. PA. L. REV. 179, 194 n. 57 (1961), and cases cited therein.

17. Eveleth, *An Appraisal of Techniques To Preserve Open Space,* 9 VILL. L. REV. 559, 567 (1964).

relief as, for example, where trees are cut. Moreover, if it later turns out that the state believes that the property subject to the development rights should be used more intensively no appreciable market for the sale of the rights would exist.[18] As a result the state would likely recover only a small part of its original investment.

Perhaps the most authoritative commentary on the efficacy of the development right approach has been offered by the National Park Service, which has acquired some 7,500 acres in development rights along federal highways in several southern states. The service recently discontinued the acquisition of such rights because after twenty years of experience it found the rights bred misunderstanding, caused administrative difficulties, were difficult to enforce, and cost only a little less than the fee.[19]

C. *Compensable Regulation*

Compensable regulation as a scheme for preserving scenic areas was devised by Professors Krasnowiecki and Paul in a study sponsored by Penjerdel, Inc., a regional planning association for Pennsylvania, New Jersey, and Delaware.[20] They advocate placing on development governmental controls similar to zoning restrictions but coupled with a guarantee that the owner will receive, at the time of the sale of his land, an amount equal to the market value of the property determined at a time prior to the imposition of the controls. The owner is paid nothing to compensate for the restrictions until he sells his property and then only an amount equal to the difference between the sale price and the earlier assessed value.[21]

This scheme is vulnerable to attack from several directions. It is certainly more complex than tax preference plans or acquisition of development rights and therefore would require more administrative machinery, thus heightening the cost of the program. In fact, it would seem difficult to predict the cost of the program with any degree of accuracy. In addition, there are inherent in the plan enforcement problems which are similar to those discussed with regard to development rights. Finally, many citizens would oppose on philosophical and economic grounds a mandatory surrender of the landowner's right to the speculative worth of his property.

---

18. In most instances, the entire market would consist of the owner of the fee.
19. H.R. REP. No. 273, 87th Cong., 1st Sess. (1961).
20. For the definitive study of compensable regulation and a tentative draft "act" designed to implement it, see Krasnowiecki & Paul, *supra* note 16.
21. The sale price is determined at a review board supervised public auction where the necessary adjustments are made for inflation.

II. Preservation Based on Private Initiative

At a time when New York is willing to spend 100 million dollars, Pennsylvania 70 million dollars, New Jersey 60 million dollars, and Wisconsin 50 million dollars to preserve areas of scenic beauty, it seems incomprehensible that state governments have, for the most part, neglected the possibility of acquiring scenic rights in land through voluntary restrictive agreements.[22] This neglect is not justifiable in view of the tremendous savings which would accrue to a state from the successful implementation of such a program.

This note will examine and evaluate the potential efficacy of one type of voluntary program designed to preserve areas of scenic beauty. This program revolves around the concept of what has been dubbed "do-it-yourself-zoning" and, to date, has been adopted in one jurisdiction—New York.[23]

The scope of the New York program is presently limited to that area in the Adirondack Mountains within approximately one mile of the high water mark of Lake George.[24] In this area, a commission created to administer the program[25] has the power to:

> . . . sponsor, and encourage the use of forms of deeds, agreements, covenants, and other legal documents by means of which owners of real property within Lake George park may voluntarily prohibit, restrict, or control the use thereof for commercial purposes.[26]

All deeds, agreements, covenants, and other legal documents which the commission sponsors and which owners of real property in Lake George Park sign are executed in favor of the commission.[27] After two or more adjacent landowners have uniformly restricted their land in its favor, the commission may permanently zone the restricted area in conformance with the development restriction imposed by the landowners upon them-

22. N.Y. Conservation Law § 875; Pa. J. Res. 5, S.B. 45 (1963), approved by voters, Nov. 4, 1963; N.J. Stat. Ann. § 13:8A-2 (1961); Wis. Stat. § 23.09 (1957). Perhaps this neglect reflects pessimism on the part of state officials who believe that private citizens would not voluntarily surrender potentially valuable rights in land. In this regard it is interesting to note that approximately 30% of the total land acquired by the states of New York, New Jersey, and Connecticut for parks between 1942 and 1956 was obtained through gifts. *The Race for Open Space*, 96 R.P.A. Bull. 53 (1960).

23. Eveleth, *supra* note 17, at 576.

24. N.Y. Conservation Law § 841(1).

25. *Id.* § 842.

26. *Id.* § 843(2).

27. *Id.* § 843(4). Section 843(5) empowers the commission to establish regulations by which it may authorize a necessary use of land in an individual instance by modifying in whole or in part any restriction contained in any agreement to which it is a party.

selves.[28] The commission possesses no power to zone an area unless all landowners within the area voluntarily restrict their land in favor of the commission.[29] One who refuses to impose restrictions upon his land cannot be bound by this "do-it-yourself-zoning."[30]

"Do-it-yourself-zoning," like the other new methods of preserving scenic areas, is not without defects. In fact, it could be argued that the plan generates as many problems as it was designed to remedy.[31] Foremost among these problems is the validity of the purported restrictions imposed by the landowner upon his estate.[32] What enforceable interest is vested in the state by the landowner when he acts under the statute to restrict the use of his land? Does the state secure a real covenant running with the land, an easement, a restrictive covenant, or no interest at all?

The statute clearly does not create a real covenant running with the land. Real covenants running with the land require "privity of estate."[33]

---

28. *Id.* § 843(10). The commission is also empowered to alter or extend a permanent zone under the procedure applicable to the original establishment of the zone. *Id.* § 843(11).

29. At last report three permanent resident zones and six proposed zones have been established. Preliminary work is under way to create eight additional zones. Eveleth, *supra* note 17, at 577, citing The Schenectady Gazette, August 30, 1964.

30. *Cf.* Eveleth v. Best, 322 Mich. 637, 34 N.W.2d 504 (1948), where neither plaintiffs nor any of their predecessors in their chain of title signed an agreement under which other lot owners in an unrestricted subdivision attempted to impose restrictions upon all the lots in the subdivision. The court held the restrictions were not applicable to the plaintiffs' lots.

31. Several problems are raised by "do-it-yourself-zoning" under the Lake George Park scheme which are not treated in this note. For instance, if the commission "secures interests or rights in real property" under N.Y. CONSERVATION LAW § 843(4) and if these rights are enforceable, as presumably they would be, why is it necessary that the commission establish a "permanent zone," § 843(10), in order to control the uses to which the restricted land is to be put? Can the restrictions, if they are enforceable, be enforced at law (it seems clear they could be enforced in equity by injunction)? How can the commission prove it has suffered monetary damages? Must the restrictions provide for liquidated damages in case of a breach before the commission has a remedy at law? Must authority appear in the statute giving the commission power to insert a provision for liquidated damages before it can be inserted in the agreements?

Does the power given by implication to the landowners in Lake George Park to make restrictions which become regulations governing the use of land which are enforceable at the instance of the commission constitute an unconstitutional attempt to delegate legislative power? Does the "power," as distinguished from the duty, to enforce the restrictions or the "power," as distinguished from the duty, to modify or waive a restriction, § 843(5), constitute unreasonable spot zoning? Does the power given to the commission to alter or modify in whole or in part any restriction contained in any agreement with the commission prevent the landowners from enforcing the restrictions *inter se?*

32. No case has yet arisen to test the validity of the restrictions.

33. One noted authority, CLARK, COVENANTS AND OTHER INTERESTS RUNNING WITH THE LAND 116-37 (2d ed. 1947), after making an exhaustive study of early English decisions reached the conclusion that privity between the covenantor and the covenantee was not necessary to satisfy the privity of estate requirement. Notwithstanding the weakness of the historical support for the privity requirement most states still adhere to it.

To satisfy the privity of estate requirement, most courts, including those in Indiana, hold there must be a conveyance of an interest in land by the covenantee to the covenantor (or vice versa) when the covenant is made.[34] This requirement would not be satisfied by the agreements between the state and the landowners under a "do-it-yourself-zoning" plan.

Some authorities have argued that agreements which limit land to residential uses have the characteristics of easements in gross,[35] but this argument is not supported by either the relevant case law or statutes. An easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in land.[36] On the contrary, an easement in gross is the right possessed by a person to perform affirmative acts upon the land of another or in any other lawful manner use that land in accordance with the terms of the easement grant.[37] Typical examples of an easement in gross are the rights to enter upon the land of another to camp, pipe water, erect and maintain telegraph poles, or erect signboards or to cross the land when it is not appurtenant to a dominant tenement.[38] Agreements executed under a New York type statute would impose negative duties upon the landowners[39] and would give the state no affirmative rights of the character enjoyed by those who hold an easement in gross. Thus, the agreements would not create easements in gross because negative easements in gross have no ex-

34. Cummings v. Alexander, 233 Ala. 10, 169 So. 310 (1936); Heimburge v. State Guar. Corp., 116 Cal. App. 380, 2 P.2d 998 (1931); Henderson Lumber Co. v. Waycross & W. Ry., 148 Ga. 69, 96 S.E. 263 (1918); Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N.E. 72 (1890); Wells v. Benton, 108 Ind. 585, 8 N.E. 444 (1886), *rehearing denied,* 108 Ind. 585, 9 N.E. 601 (1886); Conduit v. Ross, 102 Ind. 166, 26 N.E. 198 (1886); Hazlitt v. Sinclair, 76 Ind. 488 (1881); Swiss Oil Corp. v. Dials, 232 Ky. 298, 22 S.W.2d 912 (1929); Lawrence v. Whitney, 115 N.Y. 410, 22 N.E. 174 (1889); Harsha v. Reid, 45 N.Y. 415 (1871); Ford v. Oregon Elec. Ry. Co., 60 Ore. 278, 117 Pac. 809 (1911); Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 43 Wyo. 41, 297 Pac. 385 (1931); Gavit, *Covenants Running with the Land,* 5 IND. L.J. 432 (1930).

35. *E.g.,* WILLIAMS, *op. cit. supra* note 14, at 37.

36. Antonopulas v. Postal Tel. Cable Co., 261 App. Div. 564, 26 N.Y.S.2d 403 (1941), *aff'd,* 287 N.Y. 712, 39 N.E.2d 931 (1942); Banach v. Home Gas Co., 23 Misc. 2d 556, 199 N.Y.S.2d 858 (Sup. Ct. 1960); Weigold v. Bates, 144 Misc. 395, 258 N.Y. Supp. 695 (Sup. Ct. 1932).

37. Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937); Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950).

38. See, *e.g.,* Morgan v. McLoughlin, 6 Misc. 2d 434, 163 N.Y.S.2d 51 (Sup. Ct. 1957), *aff'd sub nom.,* Morgan v. Glen Cove, 6 App. Div. 2d 704, 174 N.Y.S.2d 890 (1958), *aff'd mem.* 5 N.Y.2d 1041, 158 N.E.2d 498 (1959) (to camp); Gould v. Wilson, 115 N.Y.S.2d 177 (Sup. Ct. 1957) (to pipe water); Antonopulas v. Postal Tel. Cable Co., 261 App. Div. 564, 26 N.Y.S.2d 403 (1941), *aff'd* 287 N.Y. 712, 39 N.E.2d 931 (1942) (to erect and maintain telegraph poles); Borrough Bill Posting Co. v. Levy, 144 App. Div. 784, 129 N.Y. Supp. 740 (1911) (to erect signboards); Sanxay v. Hunger, 42 Ind. 44 (1873) (to cross land).

39. They are under a duty to refrain from using their land for other than residential purposes.

istence—a negative easement must always be an appurtenant easement.[40]

A third classification in which the state's interest might be placed is the negative appurtenant easement. The chief characteristic of the negative appurtenant easement is the existence of a dominant tenement.[41] This type of easement is created for the express purpose of benefiting the possessor of the dominant tenement in his use of the tenement.[42] Therefore, if the interests held by the state are to be classified as negative appurtenant easements, they must be supported by a dominant tenement.

There are various arguments which a state might advance to demonstrate that a dominant tenement exists under a "do-it-yourself-zoning" scheme.[43] One authority suggests that it could be argued that agreements which limit land to residential use could be regarded as appurtenant to all land in the neighborhood because they increase the value of all such land.[44] However, this argument is supported by neither statutory nor judicial authority. Moreover, if the restrictions were regarded as appurtenant to all land in the neighborhood it would seem that the landowners could enforce the restrictions *inter se* and thus frustrate the state's power to permit modifications of individual restrictions when it sees fit.[45]

William H. Whyte, an authority on the problems of preserving areas of scenic beauty, has argued that a state commission which acquires use restrictions could serve as the dominant tenement.[46] However, the case law of easements reveals no instances when anything other than realty

40. 2 AMERICAN LAW OF PROPERTY § 8.12 (Casner ed. 1952).

41. Uihlein v. Matthew, 172 N.Y. 154, 64 N.E. 792 (1902); Pierce v. Keator, 70 N.Y. 419 (1877).

42. Antonopulas v. Postal Tel. Cable Co., 261 App. Div. 564, 26 N.Y.S.2d 403 (1941), *aff'd*, 287 N.Y. 712, 39 N.E.2d 931 (1942); Wilson v. Ford, 209 N.Y. 186, 102 N.E. 612 (1913); Weigold v. Bates, 144 Misc. 395, 258 N.Y. Supp. 695 (Sup. Ct. 1932); 3 POWELL, REAL PROPERTY, 392 (1952).

43. In the case of the Lake George Park scheme, the state might contend that Lake George is the dominant tenement. The case law of easements reveals no instances in which a lake was held to be either a dominant or servient tenement; and state legislatures have remained silent on this issue. In theory there appears to be no valid reason why New York courts could not hold that the lake is the dominant tenement since the absence of commercial activities as a result of the landowners' compliance with the use restrictions benefits the state as the constructive possessor of Lake George. Of course, it should be remembered that even if the above theory was widely accepted a state-owned lake will not, in most instances, be present to furnish the state with a dominant tenement if it elects, when attempting to enforce the restrictions, to consider them negative easements.

44. WILLIAMS, *op. cit. supra* note 14, at 50.

45. See note 27 *supra*.

46. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Institute, Technical Bull. No. 36, 1959). *Cf.* Note, 36 HARV. L. REV. 107 (1922), which discusses a business as a dominant tenement of an equitable servitude and cites Palumbo v. Piccioni, 89 N.J. Eq. 40, 103 Atl. 815 (1918), and Francisco v. Smith, 143 N.Y. 488, 38 N.E. 980 (1894).

was held to be a dominant tenement.[47] In view of this there seems no likelihood that the courts would recognize a corporate body as such.

Thus it appears that the only way in which a state could reasonably be certain of convincing a court that a dominant tenement exists would be to purchase land near but not necessarily contiguous to the restricted area.[48] To require the state to go to such lengths would do much to destroy the principal advantage—nominal cost—of a voluntary program to preserve scenic areas.

Even if a state could prove that it owned land which was benefited because of an agreement between itself and another by which the other imposed restrictions upon the use of his land this would not, in itself, mean that the state held a negative easement. In order for a state to prove it holds a negative easement it must demonstrate that the benefits which it enjoys as possessor fall within the class of benefits which traditionally flow to the dominant tenement as a result of the creation of such an easement.

The scope of negative easements has not been extended beyond the four types recognized by the early English cases: easements for support of a building, either laterally or subjacently, easements for the flow of an artificial stream, and easements for light and air.[49] Unless the benefits which the state secures as an owner of land fall within one of these four types of benefits, it cannot enforce the interests which it holds as negative easements even though other benefits might flow to it because of the restrictions.

Since the assumed dominant tenement would not be contiguous to the restricted land in most instances but on the contrary would be situated many miles from it, there is no hope of justifying the restrictions as negative easements for the lateral or subjacent support of buildings located on state land. The contention that the state secured a negative easement which would entitle it to the continued flow of an artificial stream also may be promptly dismissed. It would be ludicrous for the state to argue

47. One authority, Eveleth, *supra* note 17, at 569, has come to Whyte's defense by characterizing as "casual" Whyte's reference to a corporate body serving as a dominant tenement.

48. Although there must be a sufficient nexus between the dominant and servient tenement, the law of easements does not require that these tenements be contiguous. See 2 TIFFANY, REAL PROPERTY, 1224 (3d ed. 1939), and cases cited therein. Although each case supporting this proposition has involved a traditional affirmative easement, there is no valid reason why the scope of the proposition can not be extended to include negative easements as long as the possessor of the so-called dominant tenement does, in fact, derive a benefit from his use of the tenement due to the negative duties which the other landowner imposes upon himself.

49. 2 AMERICAN LAW OF PROPERTY § 9.24 (Casner ed. 1952); GALE, EASEMENTS 21-22 (13th ed. Bowles 1959); Reno, *Equitable Servitudes*, 28 VA. L. REV. 951, 976 (1942). Judicial conservatism has prevented expansion of the easement concept.

that because landowners, in a document couched in general language, restrict the use of their land to residential purposes the state thereby acquires a negative easement for the flow of any artificial stream which might pass from their land over intervening land to state-owned realty. The courts would surely reject this construction; but even if the state prevailed in its interpretation, few, if any, artificial streams which would flow over state land would also flow from the restricted areas. Thus the state still would have established no basis upon which to enforce the restrictions against the great majority of individuals who restricted their land. Likewise, the contention that the restrictions are negative easements for light and air must fail. With the possible exception of state land immediately adjacent to the restricted area, it would be foolish for the state to contend that land it owns miles distant is benefited by the restrictions and that this benefit takes the form of a negative easement for light and air.[50]

If the state fails to demonstrate that the interests which it holds and which inure to the benefit of its realty are traditional negative easements, the law will not permit it to justify the restrictions as negative easements of a novel kind.[51] One court has remarked:

> The law does not permit the owner of real estate to contract in matters affecting title as he sees fit. He cannot create new kinds of easements . . . which are not authorized or recognized at law.[52]

Thus it appears that the interests held by a state under a plan similar to the New York scheme could not be justified as easements in gross or as negative appurtenant easements.[53]

---

50. The voluminous case law in this area upholding negative easements of light and air involves situations in which the benefited and burdened tenements were in proximity. This is not unexpected in view of the fact there would be no need to secure such an easement from one distantly situated.

51. Keppell v. Bailey, 2 Myl. & K. 517, 535, 39 Eng. Rep. 1042 (Ch. 1834); 2 AMERICAN LAW OF PROPERTY § 8.12 (Casner ed. 1952); GALE, *op. cit. supra* note 49; GODDARD, EASEMENTS 111-12 (5th ed. 1921); Reno, *supra* note 49.

52. Rubel Bros. v. Dumont Ice & Coal Co., 111 Misc. 658, 182 N.Y. Supp. 204, 210 (Sup. Ct. 1920), *rev'd on other grounds,* 200 App. Div. 135, 192 N.Y. Supp. 705 (1922). One writer has persuasively argued that easements of a novel type can be created and will be enforced by the courts. It is significant to note, however, that his illustrations do not consist of new types of negative easements but rather involve new types of affirmative easements. Conrad, *Easement Novelties,* 30 CALIF. L. REV. 125 (1942).

53. If the state could refute the arguments that the interests held by the state agency are not appurtenant easements, other difficulties nevertheless persist. For example, the legislature might decide to transfer the agency's right to enforce the restrictions to another state agency. This might result in the extinguishment of the easement since an easement which is created as an appurtenant easement can not ordinarily be detached for the purpose of succession from the dominant tenement. Cadwalader v. Bailey, 71 R.I. 495, 23 Atl. 20 (1891); 2 AMERICAN LAW OF PROPERTY § 8.73 (Casner

The soundest approach under the common law appears to be to justify the state's interest as a restrictive covenant.[54] Restrictions on the use of land, like the state's interest, not falling within the scope of negative easements[55] can be classified as restrictive covenants.[56] Since it is improbable that under a "do-it-yourself zoning" plan a state will own land in the restricted area,[57] its interest would be a restrictive covenant in gross; and it should initially determine if the courts will enforce such covenants before it decides so to classify its interests.[58]

In *London County Council v. Allen,*[59] the leading case denying the enforcement of restrictive covenants in gross, a landowner applied to the plaintiffs, the London County Council, for their approval of his laying out of a new street on his land. The plaintiffs gave their approval on condition that the owner covenant not to build on the plot of land which lay across the end of the proposed street to provide facilities for the continuation of the street. The owner accordingly executed a deed in which he covenanted with plaintiffs that he, his heirs, and his assigns would not erect any structure upon the plot in question before securing the plaintiffs' consent. The plaintiffs did not possess any neighboring land

---

ed. 1952). In view of these various difficulties, one authority has concluded that refusal by the courts to enforce restrictions having purely aesthetic value has destroyed the utility of easements as devices to impose the types of restrictions most needed to preserve areas of beauty. Fratcher, *Legal Servitudes As Devices For Imposing Use Restrictions in Michigan,* 2 WAYNE L. REV. 1, 98 (1955).

54. Authorities have also referred to restrictive covenants as negative easements, Columbia College v. Lynch, 70 N.Y. 440 (1877), equitable negative easements, Equitable Life Assur. Soc'y v. Brennan, 148 N.Y. 661, 43 N.E. 173 (1896), equitable servitudes. CLARK, *op. cit. supra* note 33, at 175, and equitable easements, Pound, *Progress of The Law,* 33 HARV. L. REV. 813 (1919).

55. One writer has stated that the failure of the courts to extend the scope of negative easements to new and novel situations was probably the basis for the development of the doctrine of land restrictions now enforced as restrictive covenants. Reno, *supra* note 49, at 959.

56. If a state implementing a "do-it-yourself-zoning" program elects to consider the interests it holds as restrictive covenants they must be supported by consideration. Hendrick v. Wisehart, 57 Ind. 129 (1877); Elliot v. Kelley, 121 Ind. App. 529, 98 N.E.2d 374 (1951); Nichols v. Hays, 20 Ind. App. 369, 50 N.E. 768 (1898). This requirement will not, however, significantly increase the minimal cost of the program because the slightest consideration given by the state—for example, one dollar—would be sufficient to support the covenants executed by the landowners. First Nat'l Bank v. Farmer's Bank, 171 Ind. 323, 86 N.E. 417 (1908); Price v. Jones, 105 Ind. 543, 5 N.E. 683 (1886); Knarr v. Sand Creek Turnpike, 45 Ind. 278 (1873); Johnson v. Johnson, 10 Ind. 387 (1858); Franklin Fire Ins. Co. v. Noll, 115 Ind. App. 289, 58 N.E.2d 947 (1945); Trackwell v. Irvin, 66 Ind. App. 5, 115 N.E. 807 (1917).

57. See text accompanying note 48 *supra.*

58. The term restrictive covenant in gross denotes a covenant executed in favor of a covenantee owning no land which would be benefited by the enforcement of the covenant. If, of course, the state owned benefited land in the area of the restricted zones, the covenants would readily be enforceable by it.

59. London County Council v. Allen, 3 K.B. 642 (1914). The decision in this case was overturned by the 1936 Housing Act in connection with the operation of that act. 25 Geo. 5 & 1 Edw. 8, c. 51, § 148.

for the benefit of which the covenant was imposed, so the covenant was in gross. The owner subsequently sold the plot to the defendant, who had notice of the restrictive covenant. The defendant erected a structure on the plot in violation of the covenant, and the plaintiffs sued to enforce the restriction. The court held that the plaintiffs were not entitled to equitable relief since they owned no land in the area which would be benefited by the enforcement of the covenant.[60] From a reading of the opinion it appears that had the plaintiffs obtained land however insignificant, in the neighborhood, they could have restrained the defendant.[61]

One authority[62] has pointed out that the court's refusal in *London County Council v. Allen* to enforce the restrictive covenant in gross was logical since the court viewed the equitable covenant as analogous to a legal easement in gross, which had never been enforceable in the English courts of law against subsequent purchasers of the servient estate. However logical its decision, the court should be criticized because of its tacit admission that equity's concept of property interests and their enforceability must be confined to the categories and rules established by courts of law.

The conclusion reached by the English court in the *London County Council* case appears to have influenced the majority of American courts, including Indiana's, to deny enforcement of restrictive covenants in gross.[63] The result is illogical since most American courts have recognized,

60. The court overlooked, as a basis for a contrary decision, the police power of the Council, Note, 13 MICH. L. REV. 150-51 (1914), and the public user of the street as a dominant tenement. Note, 28 HARV. L. REV. 201-02 (1914).

61. It seems that a state holding property in proximity to a restricted tract should take care that the property held is not too small. See Kent v. Kock, 166 Cal. App. 2d 579, 333 P.2d 411 (1958), where the court refused to enforce a restrictive covenant under a uniform building scheme because the parcel retained by the plaintiff subdivider was so small that it ". . . would in nowise be benefited by the enforcement of the restrictions." *Cf.* Sylvania Elec. Products, Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962), where plaintiff executed a restrictive covenant in favor of the defendant city and, at the same time, gave the city an option to purchase thirty and one-half acres in the tract owned by plaintiff so the city would possess a dominant tenement if it ever became necessary for it to sue to enforce the covenant.

62. Reno, *supra* note 49, at 960.

63. Los Angeles Univ. v. Swarth, 107 F. 798 (9th Cir. 1901); Chandler v. Smith, 170 Cal. App. 2d 118, 338 P.2d 522 (Ct. App. 1959); Forman v. Safe Deposit Trust Co., 114 Md. 574, 80 Atl. 298 (1911); Kotesky v. Davis, 355 Mich. 536, 94 N.W.2d 796 (1959); Genung v. Harvey, 79 N.J. Eq. 57, 80 Atl. 955 (1911). The judicial opinions dealing with this problem are often confusing; and as a result, noted authors of law review articles have, in a few instances, incorrectly cited cases as holding that restrictive covenants in gross are unenforceable. *E.g.*, St. Stephens Church v. Church of Transfiguration, 130 App. Div. 166, 114 N.Y. Supp. 623 (1909), *aff'd* 201 N.Y. 1, 94 N.E. 191 (1911), cited by Reno, *supra* note 49, at 1088. In this case the court, contrary to Reno's view, evaded the crucial issue of whether the restrictive covenant in gross was enforceable. Instead, the court refused to permit enforcement of the covenant, ostensibly on the ground that it was not supported by sufficient consideration, in spite of the fact that the conveyance of the property, in itself, fulfilled the consideration requirement.

as the English courts have not, the validity of easements in gross against subsequent owners of the burdened estate.[64]

It appears that only one jurisdiction, Illinois, has decided that restrictive covenants in gross are enforceable.[65] In *Van Sant v. Rose*,[66] the plaintiffs conveyed land by a deed in which the grantee covenanted not to build any structure within thirty feet of the front or side street line of the land being conveyed and not to build any tenement building on the land. The court held that although the covenantees owned no other property in the vicinity they were entitled to enjoin violations of the covenants. The court pointed out that,[67] while a bill to enjoin a breach of restrictive covenants could not be maintained by one having no interest in their enforcement, the grantors had reserved an interest by conveying subject to the covenants. Thus, in effect, the court concluded that the restrictive covenant whose enforceability was the subject of judicial inquiry was the very interest which permitted the plaintiffs to successfully maintain their action.[68] This circularity of reasoning evidences the unwarranted reluctance of the court to grapple with the problem of the enforceability of restrictive covenants in gross on its merits.

Other criticisms have been levied against the *Van Sant* case,[69] but

---

The court in American Cannel Coal Co. v. Indiana Cotton Mills, 78 Ind. App. 115, 134 N.E. 891 (1921), stated the Indiana position:

> So long as the grantor in the deed containing the covenant, or anyone claiming under it, owned any of the original abutting or contiguous land such owner could enforce the covenant, but when such grantor or one claiming under it ceases to hold such contiguous land, the covenant becomes personal and equity will not enjoin a violation thereof in favor of the assignee of the covenantee or against the assignee of the covenantor.

64. Reno, *supra* note 49, at 1088-89.

65. Two writers have contended that restrictive covenants in gross are enforceable in New York, citing Borrough Bill Posting Co. v. Levy, 144 App. Div. 784, 129 N.Y. Supp. 740 (1911). Newman, *A Legal Approach to Equitable Servitudes*, 42 MICH. L. REV. 293, 301 (1943); Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 313 (1918). This is incorrect, however, for the case involved the right to erect signboards on the land of another, a right which has traditionally been classified as an easement in gross, and the court in the *Borrough* case specifically characterized the disputed interest as an easement in gross. Borrough Bill Posting Co. v. Levy, *supra* at 787, 129 N.Y. Supp. at 742. *Cf.* Baseball Pub. Co. v. Burton, 302 Mass. 54, 18 N.E.2d 362 (1938) (right to display sign on side of another's building held to be an easement in gross); Joachim v. Belfers, 108 N.J. Eq. 622, 156 Atl. 121 (1931) (right to erect telephone poles on another's land held to be an easement in gross).

66. Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913); *Cf.* Pratte v. Balatosas, 99 N.H. 430, 113 A.2d 492 (1955).

67. Van Sant v. Rose, *supra* note 66, at 196.

68. Despite the court's circularity of reasoning and the fact that the parties were the original covenantors and covenantees, Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913), unequivocally establishes that the law of Illinois is not so strictly defined as to require that one seeking enforcement of a restrictive covenant must show some beneficial interest in the land affected by the covenant or in some adjoining tract.

69. Note, 27 HARV. L. REV. 493 (1914); Note, 11 ILL. L. REV. 283 (1916); Note, 9 ILL. L. REV. 58 (1914).

authorities on real property law have supported the decision by pointing out that in principle there is no justifiable reason why restrictive covenants in gross should not be enforceable.[70] To the extent that these authorities have advocated allowing individual citizens to enforce restrictive covenants in gross and thus perhaps to burden their covenantor inequitably, they have advocated an argument which, if accepted by the courts, would seriously restrict the alienability of land. However, insofar as they would permit public agencies acting in the public interest to enforce such covenants they have proposed a sound rule.[71]

Dicta in two comparatively recent and well reasoned decisions evidence the judiciary's tendency to move in this direction. In *Vacca v. Stika,*[72] the defendant city conveyed a large tract of land under a recorded deed to a construction corporation which covenanted for itself, its heirs, and its assigns that no trade or business would be conducted on the property conveyed. Plaintiff later purchased the land and sought to obtain a license from the city clerk in order to operate a used car business on the land. Though the property at that time was zoned for business, the clerk, because of the restrictive covenant, refused to issue the license. Plaintiff sued for mandamus. On appeal, the New Jersey Supreme Court in an unanimous decision reversed the lower court and held that mandamus could issue only if the plaintiff had a clear right to the license and that in view of the restrictive covenants which appeared to be enforceable by the city the plaintiff did not have such a right.[73]

In *Hall v. Risley,*[74] in consideration of the city's relaxing building ordinances to permit alteration of a building for use during the war, the

70. CLARK, *op. cit. supra* note 33, at 182-83; Jones, *Equitable Restrictions on the Use of Real Property and Their Relation to Covenants Running with the Land,* CHI-KENT L. REV. 33 (1934); Newman, *supra* note 65; Stone, *supra* note 65; Note, 37 YALE L.J. 125 (1927). Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913), and Stone's views are cited with approval in Huber v. Gugliemi, 29 Ohio App. 290, 163 N.E. 571 (1928).

71. The argument that the doctrine of the unenforceability of restrictive covenants in gross should not be applied to governmental bodies can also be found by analogy to property owners' association cases. See Merrionettee Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938). In *Neponsit,* the court of appeals held that the plaintiff association could enforce the covenants even though it had not succeeded to the ownership of any property in the tract and did not own any other property to which a right of enjoyment was appurtenant. *Cf.* United States v. 64.88 Acres of Land, 244 F.2d 534 (2d Cir. 1957), holding that a government petition to take a clearance easement on land at the end of an airport runway was sufficient even though the government neither owned nor controlled any neighboring tract which would benefit from the easement.

72. 21 N.J. 471, 122 A.2d 619 (1956).

73. From a reading of the court's opinion, it appears defendant made no showing that it owned land near the restricted tract which would be benefited by enforcement of the covenant or that lots it owned in the tract were subject to the covenant so that it could secure enforcement of such covenant by invoking a uniform building scheme theory.

74. 188 Ore. 69, 213 P.2d 818 (1950).

covenantor agreed to restore the building to its previous legal use at the end of the war. The Supreme Court of Oregon held the covenant was not enforceable against a bona fide purchaser but added as a dictum that the covenant would have been enforceable against the covenantor and his successors who took with notice even though the city owned no benefited land in the neighborhood.

However, in spite of the dicta in the two preceding cases and the decision in *Van Sant v. Rose,* most courts still continue to deny enforcement of restrictive covenants in gross. This rigid judicial attitude will lead to unfortunate results in situations where a state as a covenantee is seeking to preserve regions of scenic beauty through the device of these covenants. But whether the courts can be persuaded to drop the rigid and ancient doctrine that restrictive covenants in gross are unenforceable is a difficult question to answer because of property law's traditional hostility to innovation, even when the innovation is predicated upon sound policy considerations. In view of this, for a state to contend that its interests are enforceable as restrictive covenants in gross would be to rest the future of a potentially far-reaching program on the slenderest of reeds.

III. Some Suggestions

Analysis of the enforceability of the interests which would be held by a state under a "do-it-yourself zoning" program makes it exceedingly clear that if such a program is to be free from vexing legal questions which might jeopardize its effectiveness, the legislature must draft legislation which specifically deals with these questions and which specifically spells out, as the New York statute does not, the type of interests held by the state and the enforceability of those interests.

First, an appropriate statute should assert, in unequivocal language, as the New York statute does not, that the interests which the state acquires will be statutory interests.[75] This is of crucial importance since such an assertion is the only method by which the state can remove the interests acquired under the proposal, if enacted, from the jungle of common-law property interests which, as pointed out earlier, presently threatens to topple the Lake George Park scheme.

75. In New York, the commission might argue that it holds statutory interests. Whether the courts would accept the argument that the legislature would not have enacted the statute creating the Lake George Park Commission unless it intended to give the commission power to acquire enforceable property interests even though such interests did not satisfy the traditional common law requirements necessary for the enforcement of covenants running with the land, easements, or restrictive covenants is a question of some uncertainty. The court might reason that if the legislature intended to abrogate the common-law objections to the interests held by the commission, it should have done so in no uncertain terms since it is presumed to have known the reluctance of the judiciary to recognize new types of property interests created by implication.

In the alternative, if the state, for one reason or another, wants to work within the framework of the common-law property concepts, it should enact legislation permitting it to enforce restrictive covenants in gross or, for that matter, any other type of property interest. Wisconsin, which has not passed on the question of the enforceability of restrictive covenants in gross, has enacted such a statute. It provides:[76]

> Any restriction placed on platted land by covenant, grant of easement or in any other matter . . . which names a public body as grantee, promisee or beneficiary, shall vest in such public body the right to enforce the restrictions at law or in equity against anyone who has or acquires an interest in the land subject to the restrictions.[77]

Although the Wisconsin statute raises new problems,[78] the adoption of a similar law by a state would enable it to effectively enforce previously unenforceable property interests (that is, restrictive covenants in gross) executed in furtherance of a "do-it-yourself zoning" scheme.

Second, the statute must explicitly describe, as the New York statute does not, those rights the landowner forfeits and those he retains under the agreement executed between himself and the state. If the interests created under the proposed statute are of an indefinite nature which would in turn hinder their enforcement the courts would surely hesitate to recognize their validity.[79]

Third, although the statute might raise constitutional issues,[80] it should provide, as the New York statute does not, for a reduction of property taxes on the burdened tract commensurate with the amount of development potential which has been forfeited by the landowner under his agreement with the state.[81] The reasons why this taxation provision should be included in the statute are twofold. First, although it appears

---

76. WIS. STAT. § 236.293 (1957).

77. The statute also states, "Such restriction may be released or waived in writing by the public body having the right of enforcement." WIS. STAT. § 236.293 (1957). This provision is similar to § 843(5) found in the New York statute.

78. *E.g.*, can the law relate back to the original covenantor or subsequent purchaser so as to validate the theretofore unenforceable interests acquired by the public body? See also the problems raised by N.Y. CONSERVATION LAW §§ 840-49 discussed *supra* at note 31.

79. Pontiac Improvement Co. v. Board of Comm'rs of Cleveland Metropolitan Park Dist., 104 Ohio St. 447, 135 N.E. 635 (1922).

80. See notes 10-11 *supra* and accompanying text.

81. It has been pointed out, Eveleth *supra* note 17, at 580, that there is a possibility the Federal Internal Revenue Code permits a charitable deduction for the grant of development rights to the state for the fair market value of the right with an adjustment in the basis of the property. Rev. Rul. 64-205, INT. REV. BULL. 1964-30, 6 § 170(c)(1). However, if the restrictions are enforceable *inter se*, there is a corresponding benefit to the landowner which might negate donative intent.

self-evident that a property tax would not be levied upon development values which have been surrendered to the state,[82] nevertheless subdividers who dedicate permanent easements to the public have sometimes been assessed for the full value of the land.[83] Second, a provision limiting property taxes when development potential is restricted is a powerful inducement for property owners to surrender freely their development rights.[84]

IV. Conclusions

In view of the increasing tempo of urbanization in Indiana, it seems that land planners should seriously consider the possibilities of "do-it-yourself-zoning" as an inexpensive method of preserving areas of scenic beauty. Landowners in areas where urban development is imminent will not, in most instances, donate development rights to the public even though they could secure property tax relief by so doing. It would seem though, that in scenic areas landowners having a compelling interest in maintaining the land in its present condition might be ready participants in a "do-it-yourself-zoning" program. In spite of the possibility that only a limited number of landowners might participate in such a program, the availability of "do-it-yourself-zoning" could nevertheless play a significant role in preserving areas of scenic beauty, for no other comparable land use program would offer the opportunity, under certain circumstances, to reap such large benefits at such a minimal cost.